

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

he did. Moreover, respondent asserts that claimant's credibility is so eroded by the number of false statements he has made, that his version of the events cannot possibly be accurate. Thus, respondent believes the ALJ erred and should be reversed, denying all compensation to claimant.

Claimant does not seem to dispute that he has made a number of less-than truthful statements on his employment application. But he contends that the ALJ evaluated the credibility of both himself and Michael Tinsley, claimant's supervisor, and found in claimant's favor. Thus, claimant argues that the ALJ must have been persuaded by claimant and his version of the events. Claimant believes the Board should defer to the ALJ and her analysis as to claimant's credibility and affirm the Order.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²

This Board Member has combed the record brought before the ALJ and finds there are serious questions of credibility relating to this claim. Only one version of the events can exist in this scenario. Either claimant was hurt on May 4, 2009 lifting a compressor as he says or he wasn't. That determination most certainly hinges upon the claimant's testimony and that of claimant's supervisor, Mr. Tinsley and his co-worker, Mr. McAnally. Moreover, the medical evidence raises more questions as the records relating to claimant's emergency care 4 days after the alleged accident reflect no acute objective injury. Rather, claimant is ultimately diagnosed with a degenerative condition, not any acute injury.³ To date no physician opined that claimant has aggravated his degenerative condition and requires additional treatment. But respondent has not appealed this case on that issue. Respondent's only issue on appeal is that claimant failed to meet his burden of establishing an accidental injury arising out of and in the course of his employment on May 4, 2009.

Claimant is correct in his assertion credibility is important in this case as there is conflicting testimony. Claimant is also accurate when he says that the Board has, in the past, given some deference to an ALJ's unique position to evaluate the witnesses and their credibility. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives and hear their versions of the events. In granting claimant's request for past and ongoing medical treatment the ALJ apparently believed his testimony

¹ K.S.A. 2008 Supp. 44-501(a).

² K.S.A. 2008 Supp. 44-508(g).

³ P.H. Trans., Resp. Ex. A at 5 (Dr. Hanson's July 9, 2009 IME Report).

over that offered by respondent's witnesses. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because she was able to judge the witnesses' credibility by personally observing them testify. By the barest of margins this member is persuaded that claimant sustained an accidental injury arising out of and in the course of his employment with respondent on May 4, 2009. Accordingly, the ALJ's Order is hereby affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁴ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Marcia Yates Roberts dated July 17, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent
Marcia Yates Roberts, Administrative Law Judge

⁴ K.S.A. 44-534a.